Nik James Ferrie Arkitek v Tenaga Gagah Sdn Bhd (Kuh Cho Sen & Ors, applicants)

HIGH COURT (KUALA LUMPUR) — COMPANY WINDING UP NO 28NCC-410–05 OF 2014
LAU BEE LAN J
20 MARCH 2018

Companies and Corporations — Winding up — Liquidators — Appointment of — Nomination of persons as liquidator for wound up company — Whether nominees in position of conflict of interest — Whether proof of debt rightly admitted — Whether applicants in had locus standi — Whether court decided based on majority of creditors in value or majority in number — Companies Act 1965 ss 227, 232, & 289 — Companies (Winding-Up) Rules 1972 rr 119 & 128

There were two notice of motions ie encls 101 and 104. Enclosure 101 was an application dated 30 August 2016 by the applicant, Kuh Cho Sen ('applicant in encl 101') essentially for: (a) leave to file the said application; (b) Mr Ler Cheng Chye and Lum Tuck Cheong of Messrs Ler & Lum Advisory Services Sdn Bhd ('Ler & Lum') to be appointed as the liquidators of Tenaga Gagah Sdn Bhd, the respondent, jointly and severally in substitution of the official receiver of Malaysia and without Committee of Inspection pursuant to s 232 of the Companies Act 1965 ('the CA 1965'); (c) Ler & Lum to be granted specific powers as liquidators under the CA 1965 and the Companies (Winding-Up) Rules 1972 ('the CWUR'); and (d) costs of the application be cost in the cause. Enclosure 104 was a similar application dated 1 November 2016 by the seven applicants named therein ('applicants in encl 104') essentially for: (i) leave to file the said application; (ii) Mr Wong Weng Foo of Messrs Wong Weng Foo & Co ('WWFoo') to be appointed as the liquidator of the respondent pursuant to s 232 of the CA 1965; and (iii) costs of the application be cost in the cause. Upon being served with encl 101, the official receiver had called for a general meeting of creditors and contributories of the respondent on 4 October 2016 but was adjourned. On 6 October 2016, the official receiver issued a notice of adjourned general meeting which provided that the meeting would be held at the office of the Malaysian Insolvency Department on 17 October 2016 and all completed proxy forms must be filed with the official receiver on or before 12pm on 13 October 2016 and all proof of debt were also to be filed. On the day of the meeting, the official receiver reported that: (1) five creditors with total debt value of RM26,074,832.95 voted to appoint Ler & Lum as liquidators of the respondent; (2) 255 creditors with total debt value of RM11,094,608.32 voted for Wong Weng Foo as liquidators of the respondent; and (3) one creditor with debt value of RM438,797.39 voted for the official

receiver as liquidator of the respondent. Prior to the voting of the liquidators, the chairperson of the meeting reported that 255 proof of debt forms were received on 17 October 2016 although the forms were to be filed on or before 12pm on 13 October 2016. Counsel for the petitioner objected to the inclusion of the 255 creditors but the chairperson exercised her rights under r 128 of the CWUR and accepted the 255 creditors for the purpose of voting. Subsequently, on 2 November 2016, counsel for the applicant in encl 101 raised objections against the 255 proof of debt before the court. The issues for consideration were: (A) whether the 255 proof of debt was rightly admitted; (B) whether applicants in encl 104 had locus standi; (C) whether the court decided based on the majority of creditors in value or majority in number; and (D) whether Ler & Lum was suitable as liquidator of the respondent company.

Held:

(1) The insolvency officer as the chairperson of the meeting of 17 October 2016 correctly admitted the 255 proof of debt as she was empowered to do so under r 128 of the CWUR and she had correctly exercised her power under the said provision. Rule 189 of the CWUR did not apply in the determination of encls 101 and 104 because of the exception made in the said rule 'acting otherwise than as a liquidator of a company'. The right of the applicant in encl 101 to appeal against the chairperson's decision at the meeting of 17 October 2016 was preserved under r 128 of the CWUR and he was not estopped from doing so. Further support on the availability of this right of appeal to the applicant in encl 101 found in s 279 of the CA 1965 (see paras 17–18).

(2) The submission of the applicant in encl 101 that the applicants in encl 104 have no locus standi was devoid of merit. Whilst it was true that the applicants in encl 104 had not denied receipt of RM68,028.81 from the respondent, however the applicants in encl 104 had 'vehemently deny that any agreement has been agreed upon with the respondent'. It was reasonable for learned counsel for the applicants in encl 104 to retain the amount of RM68,028.81 as stakeholders pending the determination of the appointment of the liquidator. There was no admission of there being any settlement as the applicants in encl 104 had contradicted the averment of the applicant in encl 101 (see para 20).

(3) Since the notice of motion (encl 101) was moved under CA 1965, the appropriate provision to refer to would be s 289 of the CA 1965 and not s 521 of the Companies Act 2016 ('the CA 2016') although the provisions per se were identical. Both the applicants in encls 101 and 104 moved the court under s 228 of the CA 1965 and/or the inherent jurisdiction of the court. Section 228 of the CA 1965 was inappropriate and what may be intended by the applicants was s 227 of the CA 1965 (see paras 25 & 27).

(4) There was evidence adduced that Ler & Lum were closely related with the Talam Group of Companies and so there was a possibility of conflict of interest and impartiality on the part of Ler & Lum which rendered them unsuitable to be liquidators of the respondent. Ler & Lum should had actively taken steps to communicate with the official receiver and handed over the respondent's documents and whatever monies were due to the respondent. Ler & Lum was also charging more than the imposition of RM50 under s 22D of the Housing Development (Control and Licensing) Act 1966 (see paras 30–32).

(5) Based on the above findings, the court ordered that: (a) leave be granted for the applicants in encl 104 to make the application; (b) Mr Wong Weng Foo of Messrs Wong Weng Foo & Co be appointed as the liquidator of the respondent pursuant to s 232 of the CA 1965; (c) encl 101 was dismissed; and (d) no order as to costs (see para 33).

[Bahasa Malaysia summary

Terdapat dua notis usul iaitu lampiran-lampiran 101 dan 104. Lampiran 101 adalah permohonan bertarikh 30 Ogos 2016 oleh pemohon, Kuh Cho Sen ('pemohon lampiran 101') yang pada asasnya untuk: (a) izin untuk memfailkan permohonan tersebut; (b) Encik Ler Cheng Chye dan Lum Tuck Cheong dari Tetuan Ler & Lum Advisory Services Sdn Bhd ('Ler & Lum') akan dilantik sebagai pelikuidasi Tenaga Gagah Sdn Bhd, responden, secara bersama dan berasingan sebagai pengganti penerima rasmi Malaysia dan tanpa Jawatankuasa Pemeriksaan menurut s 232 Akta Syarikat 1965 ('AS 1965'); (c) Ler & Lum diberikan kuasa khusus sebagai pelikuidasi di bawah AS 1965 dan Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('KKPS'); dan (d) kos permohonan yang menjadi kos dalam kausa tersebut. Lampiran 104 adalah permohonan yang sama bertarikh 1 November 2016 oleh tujuh pemohon yang dinamakan dalam perkara itu ('pemohon lampiran 104') pada dasarnya untuk: (i) izin untuk memfailkan permohonan tersebut; (ii) Encik Wong Weng Foo dari Tetuan Wong Weng Foo & Co ('WWFoo') untuk dilantik sebagai pelikuidasi responden menurut s 232 AS 1965; dan (iii) kos permohonan yang menjadi kos dalam kausa tersebut. Setelah dikemukakan dengan lampiran 101, penerima rasmi telah menuntut mesyuarat am pemiutang dan penyumbang responden diadakan pada 4 Oktober 2016 tetapi ditangguhkan. Pada 6 Oktober 2016, penerima rasmi mengeluarkan notis mesyuarat am yang tertangguh yang menyatakan mesyuarat akan diadakan di pejabat Jabatan Insolvensi Malaysia pada 17 Oktober 2016 dan semua borang proksi yang lengkap hendaklah difailkan dengan penerima rasmi pada atau sebelum 12 tengahari pada 13 Oktober 2016 dan semua bukti keberhutangan juga akan difailkan. Pada hari mesyuarat tersebut, penerima rasmi melaporkan bahawa: (1) lima pemiutang dengan jumlah nilai hutang sebanyak RM26,074,832.95 mengundi untuk melantik Ler & Lum sebagai pelikuidasi responden; (2) 255 pemiutang dengan jumlah nilai hutang sebanyak RM11,094,608.32

mengundi untuk melantik Wong Weng Foo sebagai pelikuidasi responden; dan (3) satu pemiutang dengan jumlah nilai hutang sebanyak RM438,797.39 mengundi untuk melantik penerima rasmi sebagai pelikuidasi responden. Sebelum mengundi pelikuidasi, pengerusi mesyuarat melaporkan bahawa 255 borang bukti keberhutangan telah diterima pada 17 Oktober 2016 walaupun borang-borang tersebut akan difailkan pada atau sebelum 12 tengahari pada 13 Oktober 2016. Peguam bagi pempetisyen membantah kemasukan 255 pemiutang tetapi pengerusi menjalankan haknya di bawah k 128 KKPS dan menerima 255 pemiutang untuk tujuan pengundian. Selepas itu, pada 2 November 2016, peguam untuk pemohon lampiran 101 membangkitkan bantahan terhadap 255 bukti keberhutangan di hadapan mahkamah. Isu-isu pertimbangan adalah: (A) sama ada 255 bukti keberhutangan dengan betul telah diterima; (B) sama ada pemohon lampiran 104 mempunyai locus standi; (C) sama ada mahkamah membuat keputusan berdasarkan majoriti pemiutang dalam nilai atau bilangan majoriti; dan (D) sama ada Ler & Lum adalah sesuai sebagai pelikuidasi syarikat responden.

Diputuskan:

(1) Pegawai insolvensi sebagai pengerusi pada mesyuarat 17 Oktober 2016 dengan betul menerima 255 bukti keberhutangan kerana beliau diberi kuasa untuk melakukannya di bawah k 128 KKPS dan beliau telah dengan betul menjalankan kuasanya di bawah peruntukan tersebut. Kaedah 189 KKPS tidak terpakai dalam penentuan lampiran-lampiran 101 dan 104 kerana pengecualian yang dibuat dalam kaedah tersebut 'yang bertindak sebaliknya sebagai pelikuidasi suatu syarikat'. Hak pemohon lampiran 101 untuk membuat rayuan terhadap keputusan pengerusi pada mesyuarat 17 Oktober 2016 adalah dipelihara di bawah k 128 KKPS dan beliau tidak dihalang daripada berbuat demikian. Sokongan lanjut mengenai adanya hak untuk merayu kepada pemohon lampiran 101 terdapat dalam s 279 AS 1965 (lihat perenggan 17–18).

(2) Hujahan pemohon lampiran 101 bahawa pemohon lampiran 104 tidak mempunyai locus standi adalah tidak bermerit. Walaupun benar bahawa pemohon lampiran 104 tidak menafikan penerimaan sebanyak RM68,028.81 daripada responden, namun pemohon lampiran 104 telah 'menyangkal dengan tegas bahawa apa-apa perjanjian telah dipersetujui dengan responden'. Adalah munasabah bagi peguam yang bijaksana untuk pemohon lampiran 104 untuk mengekalkan jumlah RM68,028.81 sebagai pihak yang berkepentingan sementara menunggu penentuan pelantikan pelikuidasi. Tiada pengakuan bahawa terdapat apa-apa penyelesaian kerana pemohon lampiran 104 telah bercanggah dengan penegasan pemohon lampiran 101 (lihat perenggan 20).

(3) Oleh kerana notis usul (lampiran 101) telah dipindahkan di bawah AS 1965, peruntukan yang sesuai untuk dirujuk adalah s 289 AS 1965 dan bukan s 521 Akta Syarikat 2016 ('AS 2016') walaupun peruntukan dengan sendirinya adalah sama. Kedua-dua pemohon lampiran-lampiran 101 dan 104 memohon untuk mahkamah di bawah s 228 AS 1965 dan/atau bidang kuasa sedia ada mahkamah. Seksyen 228 AS 1965 adalah tidak wajar dan apa yang mungkin dimaksudkan oleh pemohon-pemohon adalah s 227 AS 1965 (lihat perenggan 25 & 27).

(4) Terdapat keterangan yang menyatakan bahawa Ler & Lum berkait rapat dengan Kumpulan Syarikat Talam dan oleh itu terdapat kemungkinan konflik kepentingan dan ketidakadilan di pihak Ler & Lum yang menjadikan mereka tidak sesuai untuk menjadi pelikuidasi responden. Ler & Lum sepatutnya mengambil langkah-langkah untuk berkomunikasi dengan penerima rasmi dan menyerahkan dokumen-dokumen responden dan apa-apa wang yang terhutang kepada responden. Ler & Lum juga mengecaj lebih daripada pengenaan RM50 di bawah s 22D Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 (lihat perenggan 30–32).

(5) Berdasarkan penemuan di atas, mahkamah mengarahkan supaya: (a) kebenaran diberikan kepada pemohon lampiran 104 untuk membuat permohonan; (b) Encik Wong Weng Foo dari Tetuan Wong Weng Foo & Co dilantik sebagai pelikuidasi responden menurut s 232 AS 1965; (c) lampiran 101 ditolak; dan (d) tiada perintah mengenai kos (lihat perenggan 33).]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1645–1709.

Cases referred to

Bloxwich Iron & Steel Co, Re [1984] WN 111 (refd)
Caston Cushioning Ltd, Re [1955] 1 All ER 508, Ch D (refd)
Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (distd)
Qi-PMC Sdn Bhd v Asia Petroleum Hub Sdn Bhd [2012] MLJU 1393, HC (refd)
Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd [2014] 5 MLJ 535, CA (refd)
Southwind Development Sdn Bhd v Tanjung Tiara Sdn Bhd [2015] 1 LNS 523, HC (refd)
TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd [2014] 1 CLJ 682, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 4, 227, 227(3), 228, 232, 279, 289
Companies Act 2016 s 521
Companies (Winding-Up) Rules 1972 rr 46, 106, 114, 119, 128, 189
Companies (Winding-Up) Rules 1949 [UK] r 134
Housing Development (Control and Licensing) Act 1966 ss 22D, 22D(4), (6)
Rules of Court 2012 O 32 r 13(2)(a)
Rules of the High Court 1980 O 32 r 13(2)(b)

Ong Chin Siong (Siong & Rita) for the applicant (in encl 101).
Ong Keh Keong (Ong Partnership); Subri bin Hashim (Official Receiver, Department of Insolvency, Malaysia) for the applicants (in encl 104).

Lau Bee Lan J:

BACKGROUND

[1] There are two notice of motions before the court, encls 101 and 104. Enclosure 101 is an application dated 30 August 2016 by the applicant, Kuh Cho Sen ('applicant in encl 101') essentially for: (i) leave to file the said application; (ii) Mr Ler Cheng Chye and Lum Tuck Cheong of Messrs Ler & Lum Advisory Services Sdn Bhd ('Ler & Lum') to be appointed as the liquidators of Tenaga Gagah Sdn Bhd, the respondent, jointly and severally in substitution of the official receiver of Malaysia and without Committee of Inspection pursuant to s 232 of the Companies Act 1965 ('the CA 1965'); (iii) Ler & Lum to be granted specific powers as liquidators under the CA 1965 and the Companies (Winding-Up) Rules 1972 ('the CWUR'); and (iv) costs of the application be cost in the cause.

[2] Enclosure 104 is a similar application dated 1 November 2016 by the seven applicants named therein ('applicants in encl 104') essentially for: (i) leave to file the said application; (ii) Mr Wong Weng Foo of Messrs Wong Weng Foo & Co ('WWFoo') to be appointed as the liquidator of the respondent pursuant to s 232 of the CA 1965; and (ii) costs of the application be cost in the cause.

[3] Enclosures 101 and 104 stem from the decision of the Court of Appeal No W-02(NCC)(A)-1544–09 of 2014 whereby at paras 32 and 41 of the grounds of judgment, the Court of Appeal opined:

> [32] We went on to make a further order at the hearing of the appeal. We ordered that the official receiver be appointed as the provisional liquidator of the company with effect from the date of the winding up order, ie 31 July 2014, in place of Ler & Lum. This is turn was to counter the effect of the lack of disclosures on the part

of the solicitor for the company and the solicitors for the second petitioner, which had resulted in their preferred nominees, namely Ler & Lum being appointed as liquidators, rather than Wong Weng Foo.

...

... As stated above we further substituted the liquidators appointed under the first order for winding up with the official receiver. *This allowed the parties to apply for the liquidators of their choice by way of further application to the winding up court where they could both be heard, and a fully considered decision be made by the court ...* (Emphasis added.)

[4] Upon being served with encl 101, the official receiver had called for a general meeting of creditors and contributories of the respondent on 4 October 2016. That meeting was adjourned to a date to be fixed on the ground of insufficient quorum.

[5] On 6 October 2016, the official receiver issued a notice of adjourned general meeting of creditors and contributories of the respondent. This notice provided that the meeting would be held at the office of the Malaysian Insolvency Department on 17 October 2016. It further provided that all completed proxy forms must be filed with the official receiver on or before 12pm on 13 October 2016 and all proof of debt were also to be filed.

[6] On 17 October 2016, the official receiver held the adjourned creditors and contributories meeting and reported from its minutes of meeting (exh LMW7, encl 109 affidavit in reply affirmed by Lai Min Wang), amongst others, that:

(a) five creditors with total debt value of RM26,074,832.95 voted to appoint Ler & Lum as liquidators of the respondent;

(b) 255 creditors with total debt value of RM11,094,608.32 voted for Wong Weng Foo as liquidators of the respondent; and

(c) one creditor with debt value of RM438,797.39 voted for the official receiver as liquidator of the respondent.

[7] Prior to the voting of the liquidators, the chairperson of the meeting reported that 255 proof of debt forms were received on 17 October 2016 although the forms were to be filed on or before 12.00pm on 13 October 2016. Counsel for the petitioner objected to the inclusion of the 255 creditors but the chairperson exercised her rights under r 128 of the CWUR and accepted the 255 creditors for the purpose of voting.

[8] Although the applicant in encl 101 was present during the said meeting, he did not object to the inclusion of the 255 proof of debt.

[9] Subsequently, on 2 November 2016, counsel for the applicant in encl 101 raised objections against the 255 proof of debt before this court.

PRELIMINARY OBJECTION

[10] For the purposes of the hearing of the two notices of motions, there are altogether ten affidavits filed: encls 102, 105–112 and 116. Learned counsel for the applicant in encl 101, Mr CS Ong urged the court to disregard encls 105, 106 and 116.

[11] I have considered encls 105, 106, 108 and 116. I disregarded encl 116 on the grounds that filing of affidavits is governed by O 32 r 13(2)(a) of the Rules of Court 2012 ('the ROC 2012') which mandated the applicants in encl 104 to file and serve the affidavit in support of encl 104 on the applicant in encl 101 within 14 days from the date of the filing of the application. Enclosure 104 was filed on 1 November 2016.

[12] The applicants in encl 104 cannot willynilly file encl 116 on 19 March 2017, albeit according to them it is to replace encl 105. The applicants in encl 104 ought to seek leave of the court to file the same as affidavits have been exhausted and the court gave directions for the filing of the affidavits by 13 March 2017. Learned counsel for the applicant in encl 101 complied with the court's direction by e-filing the same on 13 March 2017 and served the hard copy on the court on 10 March 2017. Counsel for applicants, in encl 104, Mr KK Ong, filed their written submission only on 20 March 2017.

[13] In this regard, I drew support from the Court of Appeal case of *Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd* [2014] 5 MLJ 535, where the appellant, amongst others, complained that the learned High Court judge erred in allowing a preliminary objection raised by the respondent in respect of the appellant's further affidavit which was filed out of time and contrary to O 32 r 13(2)(b) of the Rules of the High Court 1980. The Court of Appeal at p 545, paras 31–34, held that the learned High Court judge had correctly exercised his discretion in allowing the preliminary objection and rejecting the said affidavit, which finding has been summarised at p 536 headnotes as follows:

> (4) The appellant had not applied for leave or abridgment of time to file the said affidavit. Furthermore the said affidavit was served after the respondent had served on the appellant's solicitors their submissions and bundle of authorities in respect of the summary judgment application.

[14] I also noted that the Commissioner of Oaths had in his handwritten comments, amongst others, stated Lai Min Wang did not affirm the affidavit

encl 106 before him (exh LCC4 in affidavit of Ler in encl 108). Having examined the affidavits in encls 105, 106 and 108, I was of the view that I should disregard encl 106 as it is defective.

MERITS OF THE APPLICATIONS

Whether the 255 proof of debt was rightly admitted?

[15] The applicant in encl 101 contended the official receiver should not have admitted the 255 proof of debt for the purpose of voting as there was no explanation offered by her on the need to comply with the deadline fixed for the filing of proof of debt on or before 12 noon on 13 October 2016.

[16] The applicants in encl 104 submitted that the chairperson of the meeting of 17 October 2016 correctly admitted the 255 proof of debt for the purpose of voting in accordance with r 128 of the CWUR and the applicant in encl 101 is estopped from raising any objection against the chairperson's decision as he did not object to the 255 proof of debt during the said meeting and neither did the applicant in encl 101 appealed against the said decision within 21 days thereof under r 189 of the CWUR.

[17] Rule 128 of the CWUR provides:

> The Chairman shall have power to admit or reject a proof for the purpose of voting, *but his decision shall be subject to appeal to the Court*. If he is in doubt whether a proof should be admitted or rejected he shall mark it as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained. (Emphasis added.)

I agreed with the submission of the learned counsel for the applicants in encl 104 that the insolvency officer as the chairperson of the meeting of 17 October 2016 correctly admitted the 255 proof of debt as she was empowered to do so under r 128 and I find she had correctly exercised her power under the said provision. This is evident from para 6 of the minutes of the meeting:

> 6. Pengerusi memaklumkan semua Borang Bukti Hutang yang telah difailkan kepada Pegawai Penerima (PP) diterima bagi tujuan pengundian dalam mesyuarat ini dan sekiranya pihak ingin membantah hendaklah dibuat di Mahkamah. Pengerusi akan merekodkan bahawa Borang Bukti Hutang pemiutang-pemiutang tersebut sebagai dibantah tertakluk kepada keputusan Mahkamah sekiranya bantahan dibenarkan kelak.

[18] Rule 189 of the CWUR provides:

A 189 An appeal to the court from an act or decision of the official receiver, acting otherwise than as liquidator of a company, shall be brought within twenty-one days from the time when the act or decision appealed against was done, pronounced or made.

B In my judgment, r 189 of the CWUR does not apply in the determination of encl 101 and 104 because of the exception made in the said rule 'acting otherwise than as a liquidator of a company'. By the Court of Appeal's order on 7 July 2015, the winding up order of 31 July 2014 was varied in that the official receiver was appointed as the provisional liquidator of the respondent and such C appointment was to take effect from 31 July 2014. In my judgment the right of the applicant in encl 101 to appeal against the chairperson's decision at the meeting of 17 October 2016 is preserved under r 128 of the CWUR and he is not estopped from doing so. Further support on the availability of this right of D appeal to the applicant in encl 101, is in my view, found in s 279 of theCA 1965 which provides that 'any person aggrieved by any act or decision of the liquidator may apply to the court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just'. 'Liquidator', according to s 4 of the CA 1965 includes 'the official receiver when acting as the E liquidator of a corporation'.

Locus standi of the applicants in encl 104

[19] The applicant in encl 101 submitted that the applicants in encl 104 no F longer have the locus standi to maintain their application in encl 104 on the ground that the respondent had reached a settlement with the applicants in encl 104 whereby payment of RM68,028.81 vide MBB cheque No 404737 dated 27 June 2014 was received by the solicitors for the applicants in encl 104, Mr Ong Keh Keong of Messrs Ong Partnership, in consideration of the G agreement on the part of the applicants in encl 104 to withdraw the Winding Up Petition No 28NCC-352–04 of 2014. The applicant in encl 101 relied on the letter dated 9 July 2014 issued by the firm of Messrs Ricky Tan & Co (former solicitors for the respondent) addressed to Messrs Ong Partnership (exh LCC14 in encl 108, affidavit in reply affirmed by Ler Cheng Chye on H 5 January 2017).

[20] The aforesaid submission of the applicant in encl 101 that the applicants in encl 104 have no locus standi is devoid of merit for these reasons. Whilst it is true that the applicants in encl 104 have not denied receipt of I RM68,028.81 from the respondent, however the applicants in encl 104 have vide para 20 in encl 111, affidavit in reply No 2 affirmed by Lai Min Wang on 13 January 2017, 'vehemently deny that any agreement has been agreed upon with the respondent'. Unfortunately I find the applicant in encl 101 omitted to quote para 20 in toto, namely:

> I further state that the respondent owes 57 other creditors with awards from the House Buyers Tribunal amounting to approximately RM650,000 hence, it *would amount to undue preference if the amount of RM68,028.81 is solely paid to us*. (Emphasis added.)

On account of that it is reasonable for learned counsel for the applicants in encl 104 to retain the amount of RM68,028.81 as stakeholders pending the determination of the appointment of the liquidator. The case of *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 MLJ 281; [1995] 1 CLJ 609 cited by the applicant in encl 101 is inapplicable; I find there is no admission of there being any settlement as the applicants in encl 104 have contradicted the averment of the applicant in encl 101 in para 27, affidavit in reply affirmed by Ler Cheng Chye on 5 January 2017.

Whether the court decides based on the majority of creditors in value or majority in number?

[21] Rule 119 of the CWUR provides:

> 119 At a meeting of creditors or contributories *a resolution shall be deemed to be passed when a majority in number and value of the creditors* or, as the case may be, contributories present, *personally or by proxy, and voting on the resolution, have voted in favour of the resolution*, the value of the contributories being determined according to the number of votes conferred on each contributory by the regulations of the company. (Emphasis added.)

[22] Based on the clear wordings of r 119 of the CWUR, if there is a majority in value *and* in number, then the resolution for the appointment of the liquidator is carried. In *Qi-PMC Sdn Bhd v Asia Petroleum Hub Sdn Bhd* [2012] MLJU 1393, in a winding up petition, the court was faced with the problem where three creditors, the petitioner and two supporting creditors, CIMB Bank and Muhibbah Engineering (M) Sdn Bhd all wanted to wind up the respondent company but each wanted the liquidator nominated by them to be appointed in preference to the liquidators nominated by the others. Lee Swee Seng JC (now J) took cognisance of r 119 of the CWUR: (i) made an order of winding up with the official receiver being appointed as the provisional liquidator; and (ii) ordered the official receiver to call a meeting of creditors and contributories pursuant to rr 106 and 46 of the CWUR and s 227 of the CA 1965 within 21 days and notices of meetings shall be served on all the creditors and contributories. The parties withdrew their respective applications.

[23] At para 23 of *Qi-PMC Sdn Bhd*, His Lordship pointed out:

> [23] The English court in *Re Caston Cushioning Ltd* [1955] 1 All ER 508 had to interprete a similar provision in r 134 of the English Companies (Winding-Up) Rules 1949 which is in pari materia with our r 119. Roxburgh J held at p 510 as follows:

> It is plain that Mr Baker was appointed liquidator unless the creditors nominated Mr Lambeth. But did the creditors nominate Mr Lambeth? Rule 134 of the Companies (Winding-Up) Rules, 1949, provides
>
> If this was a meeting to which r 134 applies, it is plain that the resolution was not passed, because it was not passed by a majority in number and value; it was passed by a majority in value which was a minority in number. It seems to me that there is no real ambiguity about that rule, and if the rule is applied, the resolution was not duly passed. That is consistent with the decision in *Re Bloxwich Iron & Steel Co* [1984] WN 111, where the court on an application gave effect to the wishes of the majority in value. It was nowhere stated in the judgment, though it was suggested in argument, that a resolution supported by a majority in value but a minority in number had been duly passed.

It is to be observed in both the English decisions of *Re Caston Cushioning Ltd* [1955] 1 All ER 508 and *Re Bloxwich Iron & Steel Co* [1984] WN 111, the English court confirmed that at a meeting to which r 134 of the English Companies (Winding-Up) Rules 1949 applies (in pari materia to r 119 of the CWUR), a resolution was passed if passed by a majority in number and value.

[24] It is clear from the results alluded to in para 6 above of the creditors meeting (no contributories were present) that a resolution for the appointment of a liquidator in accordance to r 119 of the CWUR was not passed as the results showed there was no resolution passed appointing a liquidator based on majority in number *and* value of the creditors present and voting on the resolution.

[25] Learned counsel for the applicant for encl 101 submitted that even if the votes of the 255 creditors casted on 17 October 2016 were taken into account, the court should give effect to the decision of the majority in value, namely, the five creditors with total debt value of RM26,074,832.95 who voted to appoint Ler & Lum as liquidators of the respondent. Section 521 of the CA 2016 was cited in support.

I am of the view since the notice of motion (encl 101) was moved under CA 1965, the appropriate provision to refer to would be s 289 of the CA 1965 and not s 521 of the CA 2016 although the provisions per se are identical. Section 289 of the CA 1965 provides:

> *289 Meetings to ascertain wishes of creditors or contributories.*
>
> (1) The court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the court.

(2) *In the case of creditors regard shall be had to the value of each creditor's debt.* A

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by this Act or the articles. (Emphasis added.)

B

[26] At para 28 of *Qi-PMC Sdn Bhd*, His Lordship added:

[28] It may well be that at the meeting of creditors, CIMB Bank Bhd may be able to get the resolution carried for the appointment of the liquidator nominated by them. Under r 119 if there is a majority in value and number, then the resolution for the appointment of the liquidator is carried. Even if a resolution for instance to appoint a liquidator is *not carried for failure to garner a majority in number though there is a majority in value*, the creditor(s) concerned or the *provisional liquidator may apply to court for directions or confirmation of the appointment of a liquidator and they can most certainly invite the court and the court is obliged to give regard to the wishes of the creditors, all other things being equal, based on the value of the creditors' debt*. (Emphasis added.) C D

[29] Thus a distinction is made by r 119 between the twin requirements of value and number of creditors on the one hand before a resolution to appointment a liquidator is carried and an application to court for appointment of a liquidator where the court shall have regard to the wishes of the majority in value of the creditors. E

[27] I observed that both the applicants in encls 101 and 104 moved the court under s 228 of the CA 1965 and/or the inherent jurisdiction of the court. With respect, in my opinion, s 228 of the CA 1965 is inappropriate and I believe what may be intended by the applicants is s 227 of the CA 1956, in particular, s 227(3) which reads: F

(3) the Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matter aforesaid, *the Court shall decide the difference and make such order thereon as the Court may think fit*. (Emphasis added.) G

[28] Assuming that s 289 of the CA 1965 applies, it is my respectful view that the court will have to consider the circumstances of the case. This in my judgment is in accord with the discretionary power exercisable by the court when deciding the difference between the determinations of the meetings of the creditors in respect of the appointment of the liquidator (see s 227(3) of the CA 1965). H

In fact the court in *Southwind Development Sdn Bhd v Tanjung Tiara Sdn Bhd* [2015] 1 LNS 523 (cited by the applicant in encl 101), was determining the application of the official receiver on the appointment of a liquidator when the results obtained after a creditors' meeting showed 'there was difference in value in terms of debt on the voting of proposed private liquidator and the official I

receiver in terms of value and number'. It is to be noted that the official receiver conducted the meeting in accordance to s 289 of the CA 1965 read with r 114 CWUR. Whilst the court stated it is 'obliged to give regard to the wishes of the creditor, all other things being equal, based on the value of the creditor's debt', I observed that the court considered concerns like the eight creditors (majority in number but only 4% interest in value) who opposed the appointment of HJK & AH on ground that the latter would be biased and impartial but supported the appointment of the official receiver who preferred HJK & AH on grounds like 'OR's inability to discharge their professional duties' and the lack of manpower in the OR's department which would severely prejudice the liquidation process.

This brings me to the next consideration of the suitability of Ler & Lum as liquidator of the respondent company.

Whether Ler & Lum is suitable as liquidator of the respondent company?

[29] In *TR Hamzah & Yeang Sdn Bhd v City Centre Sdn Bhd* [2014] 1 CLJ 682, Umi Kalthum Abd Majid J (now JCA) held:

> there was a possibility that the position of (Robert Teo Keng, Tuan) may be in conflict with his role as liquidator based on the ground that he was the appointed liquidator for the respondent's parent company, USSB. As USSB's only valuable assets available was its stake in the respondent, this placed Robert in conflict of interest vis the other creditors of the respondent company where his impartiality might be questioned vis the interest of the respondent company vis a vis USSB.

[30] Similarly in the present case, there is evidence adduced that Ler & Lum are closely related with the Talam Group of Companies. Based on the searches with Companies Commission of Malaysia ('CCM') (exh LMW4 encl 109, affidavit in reply affirmed by Lai Min Wang, Ler & Lum) are also the liquidators of Talam Properties Sdn Bhd and Expand Factor Sdn Bhd and Maxisegar Sdn Bhd (wound up on 22 July 2016). All these companies are developers and the corporate structure of Talam extracted from the 2001 annual report (exh LMW5) shows that the Talam Properties Sdn Bhd, Expand Factor Sdn Bhd and the respondent, Tenaga Gagah Sdn Bhd are subsidiaries or associated companies of Talam. Hence there is a possibility of conflict of interest and impartiality on the part of Ler & Lum which render them unsuitable to be liquidators of the respondent.

[31] It is not disputed that the Federal Court on 28 July 2016 dismissed Lum & Ler's application for leave to appeal against the Court of Appeal order of 7 July 2015. The applicants in encl 104 complained that although Ler & Lum conceded that they ceased to be liquidators of the respondent after 28 July 2016, yet they continued to withhold the respondent's documents, files, books and registers ('the respondent's documents') including neglecting to

forward the sum of approximately RM875,000 to the official receiver as per the Court of Appeal order of 7 July 2015, amongst others, that the official receiver be appointed the provisional liquidator with effect from 31 July 2014.

I noted that Ler & Lum has vide its solicitors' letter, Messrs Lim Kian Leong, dated 1 August 2016 (exh LCC9, encl 108, affidavit in reply affirmed by Ler Cheng Chye on 5 January 2017) informed the official receiver of the outcome of the application for leave to the Federal Court and seeking a meeting with the official receiver but stated there was no reply from the official receiver to date.

On 28 April 2017, Encik Subri bin Hashim, appearing on behalf of the official receiver, confirmed that the insolvency department did not reply to the letter of 1 August 2017. However he said:

> I can confirm that there are various e-mail communications to M/s Ler Lum Advisory Services to Pn Dian and we have requested a few information to include List of Creditors who have filed proof of debt with liquidator (Ler & Lum).
>
> As of to date we have not been given a complete list from Ler & Lum.
>
> Our e-mail communication commenced from 7 September 2016 till 23 November 2016 (last e-mail communication).
>
> ...
>
> No documents and monies have handed to us by Ler & Lum since the Order of the Court of Appeal.

In the light of the Court of Appeal's order of 7 July 2015 and the Federal Court's order of 28 July 2016, and taking the case at its highest, in my view at the very least since then, Ler & Lum should have actively taken steps to communicate with the official receiver and handed over the respondent's documents and whatever monies are due to the respondent. Without the said respondent's documents, the official receiver's office could not provide confirmations required for the sale transactions to the detriment of the respondent's creditors and owners of the Lagoon Perdana Apartment, of which the applicants in encl 104 are purchasers who had obtained awards from the House Buyers Tribunal against the respondent for late ascertained damages ('LAD') for late delivery of their units by the respondent.

[32] In paras 5 and 6 Lai Min Wang deposed as follows:

> On 28 November 2015, I have entered into a Sale and Purchase Agreement to sell my unit in Lagoon Perdana Apartment, Unit B1–2–17 for RM255,000 upon terms and conditions stated in the said agreement wherein my solicitors have written to Ler & Lum for their letter confirmation as legally required under the Housing Development Act. A copy of the said agreement and my solicitors' letter to Ler & Lum are exhibited as exh LMW2.
>
> Via letter dated 4 January 2016, Ler & Lum replied among others, stating that their fees for the letter of confirmation is 2% of the selling price which is clearly in contravention of s 22D of the Housing Development Act which only allows the

imposition of a nominal amount of RM50 for the said letter of confirmation. A copy of the said letter is enclosed as exh LMW3.

Section 22D(4) of the Housing Development (Control and Licensing) Act 1966 (Act 118) ('the HDA') provides:

(4) The housing developer shall provide all necessary and accurate confirmation of the records in the register whenever requested by a purchaser of the housing accommodation or his solicitors or his financier or his financier's solicitors subject to a payment of a fee not exceeding fifty ringgit or such amount as may be prescribed from time to time for meeting every request for confirmation in respect of all of the following:

(a) full particulars of the housing accommodation;

(b) the postal address of the housing accommodation;

(c) the current purchaser of the housing accommodation;

(d) the current chargee or assignee of the housing accommodation;

(e) *the total amount due to the developer under the sale and purchase agreement as at the date of the confirmation*; and

(f) such other matter as may be prescribed from time to time. (Emphasis added.)

Section 22D(6) of the HDA provides:

(6) Any housing developer who —

...

(d) fails or refuses to provide any confirmation in contravention of subsection (4) or imposes any condition or any other fee in respect of any matter arising from subsection (4), shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

Encik Subri confirmed '*that it is our (official receiver) practice to charge RM50 for confirmation of the sales of the ownership of the property whether charged to the bank, whether there are encumbrances*'.

With respect by charging fees at 2% of the value of sale transaction, I find Ler & Lum is charging more than the imposition of RM50 under s 22D of the HDA.

CONCLUSION

[33] For the foregoing reasons I made the following order:

(a) leave be granted for the applicants in encl 104 to make the application (prayer 1);

(b) Mr Wong Weng Foo of Messrs Wong Weng Foo & Co be appointed as the liquidator of the respondent pursuant to s 232 of the CA 1965 (prayer 2);

(c) encl 101 is dismissed; and

(d) no order as to costs.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali